

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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MELVIN O. ADETUYI,

USDC SDNY
DOCUMENT
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DATE FILED: 08/09/12

Plaintiff,

- v. -

10 Civ. 8750 (DAB)

ADOPTION OF REPORT  
AND RECOMMENDATION

U.S. POWER GENERATING CO., ET. AL.,

Defendants.

-----X  
DEBORAH A. BATTs, United States District Judge.

On December 9, 2011, United States Magistrate Judge Theodore H. Katz issued a Report and Recommendation ("Report"), recommending that Defendant United States Government (the "Government")'s Motion to Dismiss the Amended Complaint be GRANTED in its entirety. (Report at 3.) Specifically, Magistrate Judge Katz recommends that the claims against the Government be dismissed with prejudice and the claims against Defendant U.S. Power Generating Company ("U.S. Power") be dismissed without prejudice. (Report at 3, 8.) For the following reasons, Magistrate Judge Katz's Report dated December 9, 2011 shall be ADOPTED as to its recommendation to dismiss with prejudice the claims against the Government with, and as to its recommendation to dismiss without prejudice the claims against U.S. Power. However, the Report shall be MODIFIED to allow Plaintiff 20 days from the date of this Order to serve his Amended Complaint on Defendant U.S. Power; if Plaintiff fails to effect service by that

date, the Complaint against U.S. Power shall be dismissed with prejudice.

Pursuant to 28 U.S.C. § 636(b)(1)(C), "[w]ithin ten days after being served with a copy [of a Magistrate Judge's Report and Recommendation], any party may serve and file written objections to such proposed findings and recommendations. . ." 28 U.S.C. § 636(b)(1)(C); see also Fed. R. Civ. P. 72(b). "To accept the report and recommendation of a magistrate, to which no timely objection has been made, a district court need only satisfy itself that there is no clear error on the face of the record." Wilds v. United Parcel Serv., Inc., 262 F.Supp.2d 163, 169 (S.D.N.Y. 2003). The District Court is required, however, to make a "de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made." 28 U.S.C. § 636(b)(1)(C). After conducting the appropriate level of review, the Court may then accept, reject, or modify, in whole or in part, the findings or recommendations made by the Magistrate. 28 U.S.C. § 636(b)(1)(C).

Plaintiff has filed timely objections to Magistrate Judge Katz's December 9, 2011 Report. The Court is also in receipt of and has reviewed the Government's December 22, 2011 letter responding to Plaintiff's objections, and Plaintiff's January 3, 2012 letter, responding to the Government's letter.

Plaintiff's "objections" dated December 13, 2011 do not specifically address the Magistrate's findings as to why his claim should be dismissed. (See Pl.'s Objs. at 1-2.) Regarding the findings that Plaintiff's claims against the United States are "factually frivolous because [they are] clearly irrational and incredible" and that if the "Amended Complaint were to be construed as raising constitutional claims against the Government, such claims are barred by the doctrine of sovereign immunity", (Report at 4, 6), Plaintiff makes no specific objection. Instead, Plaintiff states he has "every reason to believe magistrate [sic] Judge Katz is Jewish or of Jewish descent and Jews have been proven to be extremely biased towards Black descendants." (Pl.'s Objs. at 1.) Plaintiff claims he would "prefer another magistrate Judge who is unbiased to take another look at the case and give a Report and recommendation." (Pl.'s Objs. at 1.) Beyond these conclusory allegations of bias, however, Plaintiff offers no evidence to suggest any bias on the part of Magistrate Judge Katz or any evidence to suggest that his case has not been fully and fairly reviewed. After a de novo review, the Court accepts and adopts the findings and recommendation that Plaintiff's claims against the Government be dismissed as factually frivolous, or in the alternative, as barred by the doctrine of sovereign immunity. Accordingly, the Amended Complaint is hereby DISMISSED against the

United States Government, with prejudice.

With regard to Defendant U.S. Power, Judge Katz's Report notes that the Amended Complaint was filed in this action on March 21, 2011 and as of the date of the Report, it had not been served on U.S. Power. Plaintiff was sent information from the Court's Pro Se Office advising him of his obligation to effect service within 120 days and that the case would be dismissed if the Defendants were not properly served. Judge Katz issued an Order on June 6, 2011 reminding Plaintiff of his obligation to effect service and advising him that failure to do so could result in dismissal of the action. Judge Katz's December 9, 2011 Report re-iterated this information. (Report at 7-8.) To date, the Amended Complaint has still not been served on Defendant U.S. Power, nor has Plaintiff sought additional time to serve or offered an explanation for his failure to serve. Nearly 18 months have passed since Plaintiff filed his Amended Complaint, and in that time Plaintiff has repeatedly ignored Orders from the Court reminding him of his responsibility to effect service on U.S. Power. Accordingly this Court adopts Magistrate Judge Katz's recommendation and, pursuant to Rule 4(m) of the Federal Rules of Civil Procedure, DISMISSES the Amended Complaint against U.S. Power, without prejudice. In addition, the Court modifies Judge Katz's Report as follows: Within 20 days from the date of this Order, Plaintiff shall serve his

Amended Complaint on Defendant U.S. Power; if Plaintiff fails to effect service by that date, the Complaint against U.S. Power shall be dismissed with prejudice.

Having conducted the appropriate levels of review, this Court APPROVES, ADOPTS, and RATIFIES the Report and Recommendation of United States Magistrate Theodore H. Katz dated December 9, 2011 as follows: The United States Government's Motion to Dismiss is GRANTED in its entirety, and the Amended Complaint against the Government is DISMISSED, with prejudice. The Amended Complaint is DISMISSED against Defendant U.S. Power, without prejudice. Plaintiff shall serve his Amended Complaint on U.S. Power within 20 days of the date of this Order, or the Amended Complaint shall be dismissed against U.S. Power with prejudice.

SO ORDERED.

Dated: August 9, 2012  
New York, New York

Deborah A. Batts  
DEBORAH A. BATTTS  
United States District Judge